

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2001- 05 -CWP

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In the Matter of the Petition of  
**CARROLL BELCHER, PAUL BURGNER, ALFREDO FAJARDO,  
MANUEL LOVIO, CHRISTOBAL MARCOS, ROY CORY OVIEDO,  
JORDAN SIPLON, ROLANDO UMALI, AND NICANOR VALDEJUEZA**  
for review of a Determination by the  
Division of Clean Water Programs,  
State Water Resources Control Board  
Regarding Denial of Operator-In-Training Certificates

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BY THE BOARD:

Mr. Carroll Belcher, Mr. Paul Burgener, Mr. Alfredo Fajardo, Mr. Manuel Lovio, Mr. Christobal Marcos, Mr. Roy Cory Oviedo, Mr. Jordan Siplon, Mr. Rolando Umali, and Mr. Nicanor Valdejeza (Appellants) seek review of the Division of Clean Water Programs' (Division) Final Division Decision (Decision) to deny their applications for wastewater treatment plant Operator-in-Training (OIT) certificates. The Division's Decision was based on a finding that at the time their OIT applications were submitted, Appellants were not performing the duties of an operator and therefore were not eligible for certification. After a review of the record and for the reasons set forth below, the State Water Resources Control Board (SWRCB or Board) finds that the Division's Decision was proper. (Cal. Code Regs., tit. 23, § 3715, subd. (a)(2).)

**I. STATUTORY, REGULATORY, PROCEDURAL  
AND FACTUAL BACKGROUND**

Chapter 9, Division 7, of the Water Code governs the certification of wastewater treatment plant operators and supervisors. (Wat. Code, § 13625 et seq.) The Chapter mandates that “[s]upervisors and operators of wastewater treatment plants shall possess a certificate of appropriate grade in accordance with, and to the extent recommended by [an] advisory committee and required by, regulations adopted by the state board.” (*Id.* § 13627, subd. (a).) The Chapter further provides that the SWRCB “shall classify types of waste water treatment plants for the purpose of determining the levels of competence necessary to operate them” and

<i>Class</i>	<i>Treatment Process</i>	<i>Design Flow (in million gallons per day)</i>
IV	Primary .....	Greater than 20.0
	Biofiltration .....	Greater than 10.0 through 30.0
	Activated Sludge.....	Greater than 5.0 through 20.0
	Tertiary .....	Greater than 1.0 through 10.0
V	Biofiltration .....	Greater than 30.0
	Activated Sludge.....	Greater than 20.0
	Tertiary .....	Greater than 10.0

(Cal. Code. Regs., tit. 23, § 3675.)

The plant classification number is used to establish the grade of wastewater treatment plant operator certificate that must be held by supervisors and operators of each class of plant. (Cal. Code. Regs., tit. 23, § 3680.)

The regulations set forth the experience and education necessary to qualify for various grades of certification. With the exception of an OIT certificate, applicants for each grade of certificate are required to have a specified number of years of experience “performing the functions of a wastewater treatment plant operator” at any grade level or a lesser number of years performing the functions of a wastewater treatment plant operator while certified as an operator at a grade level immediately below the grade being sought. (Cal. Code Regs., tit. 23, § 3683.) In addition, applicants may be credited with one year of qualifying experience if they have had two or more years of full-time experience in the operation of a water treatment plant regulated by the California Department of Health Services or by a government agency in another state and while in possession of a valid water treatment plant operator certificate, if: (1) the water treatment plant where the experience was gained uses two or more of the following processes: coagulation, sedimentation, aeration, filtration, oxidation, or disinfection and (2) at the time of their application they have had one year of full-time experience in the operation of a wastewater treatment plant. (*Id.* § 3684.)

An OIT certificate may be issued to a person who is acting in the capacity of a certified operator if the OIT is under the direct supervision of a certified operator of the same or higher grade and is performing the duties of the grade of operator for which the certificate was issued. (Cal. Code Regs., tit 23, § 3707.) The regulations provide that “operator” means “any

superintendent returned the certificates because the persons to whom they were issued were transferred to the ERF and they were no longer “working in wastewater operations.”<sup>2</sup>

In an effort to consolidate facilities and reduce costs, the City has placed the ERF in a nonoperational “standby mode.” Staffing at the facility has been reduced from 40 to 16.<sup>3</sup> ERF Operators have been given an opportunity by the City to become “transitional workers” by moving into the wastewater treatment portion of the Hyperion facility where they would rotate through the plant to learn the treatment plant process and become certified wastewater treatment plant operators. For those ERF Operators who chose to become “transitional workers,” the Division issued OIT certificates at the time those Operators began working in the new positions. “Transitional workers” lost whatever seniority they had with the City and began accruing seniority from the time they started in the new positions. For this reason, some of the ERF Operators who were concerned about possible future layoffs chose not to become transitional workers and retained their positions in the ERF.

At the time of their applications for OIT positions, Appellants (who remained in the ERF) performed duties consisting of operation and maintenance of pumps, compressors, gas turbine engines, diesel electric generators, and boilers that produced steam used to heat the digesters. The steam was transmitted from the ERF to the anaerobic digester facility where a certified wastewater treatment plant operator monitored and managed heat application to the digesters. Generator units operated by the ERF Operators also produced power for the plant equipment. Because the ERF was in standby operation, digester gas from the wastewater treatment plant portion of the Hyperion facility was conveyed to an adjacent City of Los Angeles Department of Water and Power generation facility that uses the gas to produce electrical energy. In return for the gas produced electrical energy, the Hyperion Wastewater Treatment Plant received electricity at a reduced rate.

On February 9, 1998, the Division of Clean Water Programs received a request from the Hyperion Acting Wastewater Treatment Plant Manager that the Division issue ten OIT

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<sup>2</sup> See letter of November 5, 1997 to Mr. Cleo Hartman from Hiddo D. Netto.

<sup>3</sup> On February 12, 2000, the City consolidated the ERF with the Hyperion Wastewater Treatment Plant. The remaining ERF Operators have become “transitional” workers and now rotate throughout the plant, operating all wastewater treatment plant facilities. Since that time, the ERF Operators have been eligible for OIT certificates. The issues raised by the petition have not, however, become moot since the ERF Operators are still seeking credit towards certification for their time working at the ERF.

ERF and did not rotate through other facilities at the plant, those operators should not be given qualifying time towards wastewater treatment plant operator certification.<sup>6</sup>

Two of the advisory committee members who were employed at plants that had separate Energy Recovery Facilities agreed to provide the Division with written statements concerning the policy of their respective agencies with regard to ERF Operators. The written statements were dated October 1, 1999 and December 2, 1999.<sup>7</sup> Both indicated that where the sole function of an operator was to operate an ERF, the operator should not be required to have a wastewater treatment plant operator certificate, nor should the operator gain qualifying experience toward wastewater treatment plant operator certification.

## II. CONTENTIONS AND FINDINGS

1. Contention: In their petition, Appellants request a formal hearing to present evidence regarding the Division's decision to reject their OIT certificate applications.

Findings: Because the Division and Appellants have reached agreement on the material facts in this matter, an evidentiary hearing is unwarranted.

All adjudicative proceedings before the Board are governed by Chapter 4.5 of the Administrative Procedure Act (APA) (commencing with section 11400 of the Government Code). (Cal. Code Regs., tit. 23, § 648 subd. (b).) Subdivision (b) of section 11445.20 of the APA provides that an oral evidentiary hearing is not required if there are no disputed issues of material fact. (*See Sierra Ass'n for the Environment v. FERC* (9<sup>th</sup> Cir. 1984) 744 F.2d 661, 664.). In the absence of any disputed issue of material fact, the Board may resolve a petition as a matter of law.

On March 9, 2000, the Division sent Appellants a draft factual statement, anticipating that, if agreed upon, the statement would be made part of this Order.<sup>8</sup> The Division requested that Appellants review the draft statement and submit any suggestions or corrections, in writing, within 20 days. Appellants offered no suggested revisions or corrections to the draft statement, therefore an evidentiary hearing is unnecessary.

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<sup>6</sup> See minutes of July 7, 1999 meeting.

See letters from Philip Friess and Wendell Kido.

<sup>8</sup> See letters from Dorothy Jones to Appellants dated March 9, 2000 and draft fact statement. With only minor, nonsubstantive changes, Ms. Jones' fact statement has been incorporated into this Order.

determine whether an OIT certificate should be issued, the OOC must consider, among other things, whether the applicant will be "operating" the plant under the direct supervision of a certified operator of the same or higher grade. (Cal. Code Regs., tit. 23, § 3707.) At the time of their applications, Appellants did not operate the plant by controlling a wastewater treatment process. While Appellants may have been providing indispensable heat to the digesters, they were not controlling or monitoring the application of that heat. As Appellants' note in their petition, the heat transported to the digesters was controlled and managed by a certified Wastewater Treatment Operator. It is the regulation of the heat application to the digesters that constitutes the "control of a process" and thus the "operation" of the Plant. (*Id.*, § 3671, subd. (o).) Appellants, in their capacity as ERF Operators confined to the ERF, do not operate any treatment process at the Hyperion Plant for which certification is appropriate.

The Division properly denied Appellants' applications for OIT certificates based on a finding that, at the time their OIT applications were submitted, Appellants were not performing duties for which certification is appropriate.

3. Contention: Appellants contend that their duties as ERF Operators parallel those of Hyperion's Cryogenic Facility Operators (Cryogenic Operators), and maintain that since the OOC issued OIT certificates to Cryogenic Operators in 1996, they should also be issued OIT certificates.

Findings: It is not necessary for the Board to compare the duties of Hyperion's ERF Operators with the duties of its Cryogenic Operators in order to resolve the issues raised in this petition. As discussed above, the Division correctly determined that Appellants were not performing duties for which certification is required, and therefore were not eligible for certification. If the duties of the Cryogenic Operators were parallel, in that they did not perform duties for which certification is required, that would indicate that it was error to issue certificates to the Cryogenic Operators, not that certificates should be issued to Appellants. The Appellants did not challenge the issuance of OIT certificates to the Cryogenic Operators at the time those certificates were issued, and do not ask that we reopen the issue now.

Issuance of certificates to the Cryogenic Operators did not establish a precedent that may be relied on by Appellants. An agency's decision cannot be expressly relied on as precedent unless the agency has designated the decision as a precedent decision. (Gov. Code § 11425.60, subd. (a).) The Board has designated as precedent only those orders and decisions

In their petition, Appellants repeatedly contend that the OOC denied their OIT applications based solely on their job classifications as ERF Operators rather than the merits of their duties.<sup>9</sup> However, nothing in the record supports this contention. In fact, the record plainly shows that the OOC considered Appellants' job duties very carefully before deciding to deny certification. Similarly, there is no support for Appellants' allegation that the OOC was influenced by Hyperion's Wastewater Treatment Operators who lobbied against the issuance of OIT certificates to Appellants. The record appropriately contains comment letters from interested persons. However, there is nothing to indicate that these submittals unduly influenced the OOC's decision. In any event, consideration of these submittals would have no impact on whether the ultimate action of the OOC was discriminatory. The record clearly shows that the OOC's decision was correctly directed by a consideration of Appellants' duties as ERF Operators.

Appellants' contention that they perform duties analogous to Hyperion's Cryogenic Operators, even if true, does not establish discrimination. As previously discussed, the issue of whether ERF Operators perform duties similar to Cryogenic Operators does not need to be reached in order to resolve the issues raised in this petition. However, even if Appellants' contention that they perform duties analogous to Hyperion's Cryogenic Operators is accepted as true, that alone does not support a finding of discrimination. Rather, that assumption would only suggest that the OOC erred when it issued OITs to Cryogenic Operators in 1996. There is no evidence of any unlawful pattern or practice by the OOC of knowingly issuing certificates to otherwise ineligible applicants, nor is there evidence of any kind of orchestrated campaign of vindictiveness, sheer malice or spite against Appellants. Without more, a single erroneous application of the regulations by the OOC, conferring a benefit to one, does not constitute a denial of equal protection to those similarly situated who are denied the same. (*See Sunday Lake Iron Co. v. Wakefield* (1918) 247 U.S. 350 (mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guarantees of equality).)

Finally, Appellants' comparison between themselves and Operators of the Co-Generation Facility at the JWPC Plant is misleading. While both groups operate Energy Recovery Facilities, Appellants are not similarly situated to the Co-Generation Operators at the

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<sup>9</sup> Appellants do not allege that the OOC's decision to deny them OIT certificates was based on any invidious criterion.

#### IV. ORDER

IT IS HEREBY ORDERED THAT Appellants applications for OIT certification are denied.

#### CERTIFICATION

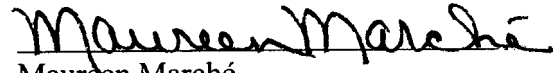
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 7, 2001.

AYE:           Arthur G. Baggett, Jr.  
                  John W. Brown  
                  Peter S. Silva

NO             None

ABSENT:       None

ABSTAIN       Richard Katz

  
Maureen Marché  
Administrative Assistant to the Board